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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-860

THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE; APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors,

Petitioners,

vs.

TOM SHIRLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE; APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors,

Petitioners,

vs.

TOM SHIRLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The above captioned Petitioners pray that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Arizona entered by that Court in Cause No. 11237 on September 7, 1973.

Opinion Below

The opinion of the Supreme Court of Arizona is not yet officially reported, but is unofficially reported in 513 P.2d 939. The

opinion of that Court denying rehearing is not reported. Copies of the original opinion, the Order denying rehearing and the lower court judgment are appended hereto.

Jurisdiction

The Judgment of the Arizona Supreme Court was entered on September 7, 1973. A timely filed Motion for Rehearing was denied on October 2, 1973; this Petition for Certiorari was filed within 90 days of the original Judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. The Respondent is an unemancipated Navajo Indian residing within the Navajo Reservation. Relying upon Sections One and Two of the 14th Amendment to the United States Constitution, the United States Supreme Court in *Elk v. Wilkins,* 112 U.S. 94, 5 S.Ct. 41, 28 L.Ed. 643 (1884) held that such Indians are not citizens of the United States. The decision below, by implication, is contrary to *Elk v. Wilkins.* Consequently, a major question presented in this case is whether the Respondent is a citizen of the United States or of the State of Arizona and therefore qualified to hold the office of Apache County Supervisor? Comprised within that issue is the question of whether 8 U.S.C. § 1401 (a)(2), which purports to confer citizenship upon the Respondent, is contrary to the 14th Amendment to the United States Constitution, and thus unconstitutional.

2. Is the Respondent a resident of Apache County, Arizona and therefore qualified to hold the office of Apache County Supervisor?

3. Does allowing the Respondent, an unemancipated Navajo Reservation Indian, to hold the office of Apache County Supervisor when he and his Reservation Indian constituents are immune from taxation, constitute Taxation without Representation and

Representation without Taxation and thereby violate the Petitioners Rights of Equal Protection and Due Process of Law under the 5th and 14th Amendments to the United States Constitution?

4. Does allowing the Respondent to hold the office of Apache County Supervisor when he is not subject to the civil and criminal laws and jurisdiction of the Courts to the same extent as the Petitioners, violate the Equal Protection and Due Process Clauses of the 5th and 14th Amendments to the United States Constitution?

5. Are the Civil Rights of the Petitioners, established under 42 U.S.C. § 1981, violated by the Respondent holding the office of Apache County Supervisor when he is not subject to same pains, penalties, punishments, and taxes as are the petitioners?

Constitutional Provisions Involved

Amendment V

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole numbers of persons in each State, *excluding Indians not taxed.*" (Emphasis supplied).

Statutes Involved

The Federal Statutes involved are 8 U.S.C. § 1401 (a) (2) and 42 U.S.C. § 1981. The Arizona Statutes involved are A.R.S. §§ 38-201 and 11-211. Because these provisions are lengthy, their pertinent text is set forth as Appendix E.

Statement Under Rule 33 (2) (b)

Since this proceeding draws into question the constitutionality of 8 U.S.C. § 1401, an act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403 may be applicable.

Statement of the Case

This suit arises out of an election in Arizona for Apache County Supervisor in Supervisoral District No. 3 held in November of 1972. In that election the Respondent, an unemancipated Navajo Indian, received a majority of votes for the office of Supervisor in Supervisoral District No. 3. The Petitioners, Minyard, Spurlock, Platt and Reese are non-Indian residents of Apache County and are the owners of real and personal property subject to taxation. (Findings of Fact, ¶1). Petitioners Larry Stradling, Arthur Lee, and Margaret Lee are members of the Apache County Board of Supervisors and Clerk thereof. Petitioner McDonald was the third member of the Board until replaced by the Respondent by the erroneous decision of the Arizona Supreme Court. The Respondent is a Navajo Indian residing on the Navajo Indian Reservation who owns no property off the Reservation and, as a consequence of his status as a Reservation Indian, pays no taxes on real or personal property which he owns on the Reservation. (Findings of Fact, ¶2). He also is not subject, for the most part, to the criminal and civil jurisdiction of the state or federal courts or amenable to state or federal law.

The Petitioners, Minyard, Spurlock, Platt and Reese (hereinafter designated "taxpayers") brought suit in the trial court to enjoin the members of the Board of Supervisors and the Clerk thereof (also petitioners herein, hereinafter designated "Supervisors") from issuing a Certificate of Election to the Respondent, Tom Shirley (hereinafter designated "Shirley"). The complaint alleged that it would violate the taxpayers rights to Due Process of Law and Equal Protection of Law under the 5th and 14th Amendments to the United States Constitution if Shirley were allowed to hold a public office wherein he would have the power to impose county property taxes upon the non-Indian taxpayers of the county (who constitute a minority of the population) and to spend said tax money while the Respondent Shirley and his Reservation Indian constituency are immune from the payment of the taxes he would impose. Plaintiffs also alleged that it would violate the 5th and 14th Amendments to the Constitution for Shirley to hold public office when he is immune from most county, state and federal laws and civil and criminal process. A question of state law concerning a conflicting public office was also raised which was ruled on by the trial court in the taxpayers' favor, but reversed by the Arizona Supreme Court which consequently required the Arizona Supreme Court to rule upon the Constitutional issues presented. The Arizona Court's ruling on this question of state law is not challenged here.

A Temporary Restraining Order was issued upon filing the Complaint enjoining the Supervisors from issuing a Certificate of Election to Shirley. The action was then removed to Federal Court by Shirley, but was remanded to the State Court because of the question of state law heretofore referred to. Soon after remand the taxpayers filed a Motion for Summary Judgment on the merits of the entire case. Shirley filed a Motion for Judgment on the Pleadings to be argued at the same time. It was agreed by counsel for all parties that the ruling on the Preliminary

Injunction would constitute a ruling on the Permanent Injunction (R.T. at 8 & 9). The Motion for Summary Judgment specifically raised and briefed each of the federal questions presented in this Petition for Certiorari as evidenced by the trial court record which has been certified to this Court. In the Motion for Summary Judgment the issues of citizenship and residency were briefed at pages 23-33, the issue of jurisdiction at 15-22, the issue of civil rights at 22, and the issue of taxation at 10-15. The trial court granted the injunction and made Findings of Fact and Conclusions of Law which treated the issues as follows:

(1) The trial court rejected the taxpayers' proposed finding that Shirley was not a citizen and resident of the United States and Arizona but rather found that Shirley was "a qualified voter" (Findings of Fact, ¶2) which presupposes Shirley's citizenship and residence under A.R.S. § 38-201.

(2) The trial court found that Shirley's immunity from taxation "would deprive Plaintiffs of equal protection of the law under the 5th and 14th Amendments to the United States Constitution". (Conclusion of Law, ¶2).

(3) The trial court found that there could be no civil or criminal personal or subject matter jurisdiction over Shirley or his activities in many instances, and that his holding office under those circumstances would deprive the Plaintiffs "of any recourse in a court of law were Tom Shirley to engage in criminal or civil violations of law, thereby depriving Plaintiffs, as taxpayers, of due process by which either their tax monies or the property purchased with their taxes might be recovered". (Conclusion of Law, ¶3).

After the Preliminary Injunction was entered by the trial court, Shirley then sought review in the Arizona Supreme Court by a Petition for Special Action which the Arizona Supreme Court accepted. At this stage, Shirley designated himself "Petitioner" and the Board of Supervisors and Plaintiffs below as "Respondents". The taxpayers opposed the requested relief in a "Memo-

randum in Opposition to Relief Requested in Petition for Special Action" wherein the federal and constitutional points raised in the "Questions Presented" by this Petition were briefed under the following principal headings:

"B. TAXATION WITHOUT REPRESENTATION AND REPRESENTATION WITHOUT TAXATION". (at page 15 of the memorandum).

"C. THE STATE AND FEDERAL COURTS IN MOST INSTANCES WILL LACK PERSONAL JURISDICTION OVER TOM SHIRLEY AND SUBJECT MATTER JURISDICTION OVER HIS ACTIONS IN OFFICE". (at page 20 of the memorandum).

"D. PETITIONER IS INELIGIBLE TO HOLD OFFICE SINCE HE IS NEITHER A RESIDENT OF ARIZONA NOR A CITIZEN OF ARIZONA OR THE UNITED STATES". (at page 30 of the memorandum).

"D. (sic) PETITIONER'S HOLDING THE OFFICE OF SUPERVISOR WOULD VIOLATE THE CIVIL RIGHTS ACT". (at page 42 of the memorandum).

The Arizona Supreme Court on September 7, 1973 granted the relief requested by Shirley in the Special Action. In so doing, the Arizona Supreme Court discussed only those federal questions briefed in heading "B" and "C" quoted above. The questions clearly raised both at trial and in the Arizona Supreme Court concerning the Petitioner's citizenship and residency were not ruled upon except inferentially by stating that the Reservation Indians are, by prior Arizona case law, entitled to vote in Arizona which presumes citizenship and residency. The question raised by the taxpayers at trial and before the Arizona Supreme Court concerning violation of the Civil Rights Act was not mentioned in the Opinion.

The Supervisors also argued before the Arizona Supreme Court that their right to equal protection under the 14th Amendment and their rights under the Civil Rights Act would be violated if Shirley were permitted to hold the office of County Supervisor.

(Supervisors response to Petition for Special Action at page 2 & 3). The Arizona Supreme Court failed to rule on these issues as they relate to the Supervisors.

Ruling on the question of lack of jurisdiction over Tom Shirley, the Court held:

> "Concerning the question of whether Tom Shirley is immune from service of civil process by residing on the reservation, we fail to see how this could affect his office."

Ruling on the question of Shirley's immunity from taxes he would impose, the Court held:

> "We cannot find any violation of the 5th or 14th Amendments on this account."

A joint Motion for Rehearing was timely filed by the taxpayers and Supervisors particularly stressing that the Court should rule on the issues of citizenship, residency and civil rights which it had ignored. The Motion for Rehearing and a Motion for Stay of Judgment pending appeal, which had also been filed, were denied on October 2, 1973. According to the mandate from the Arizona Supreme Court, the trial court then entered judgment on October 11, 1973 quashing the preliminary injunction, entering judgment on the pleadings in favor of Shirley and ordering that he be certified which judgment was carried into effect.

Reasons For Granting The Writ

There have been no prior recorded opinions by any court in this country determining whether or not an unemancipated Reservation Indian may hold public office. That unique question is posed in this case. Apache County is located in the Northeastern corner of Arizona where, according to table 34 of the 1970 Census of Population (Pl. Ex. 2), 23,994 of the 32,298 people in the county are Reservation Indians (approximately 75%). The recent efforts of the Indians to become involved in politics outside of the Tribe has presented a situation where the minority of Apache County residents who pay all of the county taxes and are subject to all of the pains and penalties of state and federal law

will shortly become subservient to the dictates of the *Navajo Nation* while the residents of that Nation are essentially immune from the taxes of this county and obedience to county and state law. The resolution of the questions presented by this case are of supreme importance not only to 7,000 residents in Southern Apache County, but the residents of other counties with large Reservation Indian populations such as McKinley County, New Mexico with approximately 60% Reservation Indians and Navajo County, Arizona with approximately 50% Reservation Indians.

While the Arizona Supreme Court failed or refused to deal directly with the issue of citizenship, residency, or the Petitioners' Civil Rights, these issues were clearly raised in the trial and appellate courts below. This Court has consistently held that constitutional questions shown by the record to have been raised in the State Court give the United States Supreme Court jurisdiction to review the case notwithstanding that the appellate court of the state did not refer to the questions in its opinion. *International Harvester Co. v. Missouri*, 234 U.S. 199, 34 S.Ct. 859, 58 L.Ed. 1276 (1914). See *Green Bay, etc., Canal Co. v. Patten Paper Co.*, 172 U.S. 58, 19 S.Ct. 97, 43 L.Ed 364 (1898); *Fox River Paper Co. v. Railroad Comm. of Wisc.*, 274 U.S. 651, 47 S.Ct. 669, 71 L.Ed. 1279 (1927); *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux*, 279 U.S. 737, 49 S.Ct. 485, 73 L.Ed. 931 (1929); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969).

I. *CITIZENSHIP AND RESIDENCY*

As citizenship and residency is fundamental to the qualification to hold office, A.R.S. §§ 38-201 and 11-211, the Arizona Supreme Court clearly erred in not considering these questions in light of the 14th Amendment to the Constitution and the

opinion of the United States Supreme Court in *Elk v. Wilkins*, 112 U.S. 94, 75 S.Ct. 41, 28 L.Ed. 643 (1884).

It is highly significant to this petition that *Elk v. Wilkins* is the only reported case where the citizenship of Reservation Indians has been thoroughly considered in the light of the language of the 14th Amendment which is the supreme law of the land governing citizenship. While occasionally other cases, and indeed one or two United States Supreme Court decisions, have in dictum perfunctorily stated that the Reservation Indian is a citizen, in no case except *Elk v. Wilkins* has the court studied and ruled upon the constitutional aspects of citizenship of Reservation Indians in light of Sections One and Two of the 14th Amendment. The pertinent portions of those sections provide:

> "SECTION 1. ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES *AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS* OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE." (Emphasis supplied).

and

> "SECTION 2. REPRESENTATIVES SHALL BE APPORTIONED AMONG THE SEVERAL STATES ACCORDING TO THEIR RESPECTIVE NUMBER, COUNTING THE WHOLE NUMBER OF PERSONS IN EACH STATE, *EXCLUDING INDIANS NOT TAXED.*" (Emphasis supplied).

Relying upon the above quoted portions of the 14th Amendment, the United States Supreme Court in *Elk v. Wilkins, held that the Reservation Indian is not a citizen.* The compelling reasoning of the Supreme Court on this issue was:

> "[Section 1 of the 14th Amendment] contemplates two sources of citizenship and two sources only; birth and naturalization. The persons declared to be citizens are *'all persons born or naturalized in the United States and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance.* And

the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization Acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian Tribes, an alien though dependent power, although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the 1st. section of the 14th Amendment, than the children of subjects of any foreign government born within the domain of that government; or the children, born within the United States, of ambassadors or other public ministers of foreign Nations.

This view is confirmed by the 2d section of the 14th Amendment, which provides that 'Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.' Slavery having been abolished and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three fifths of such persons. *But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis or representation in which all other persons are now included, is wholly inconsistent with their being considered citizens."* (28 L.Ed. at 646) (Emphasis supplied).

Since *Elk v. Wilkins* has never been overruled or even distinguished on this point by later cases, the implication of the Arizona Supreme Court in the decision below that the Reservation Indian is a citizen is not in accord with this prior applicable decision of the United States Supreme Court.

The Respondent, both at trial and in the Supreme Court, has attempted to counter the question of citizenship by relying upon

8 U.S.C. § 1401 (R.T. at 97 and Petitioners Objection to Respondents' Motion for Rehearing and Stay at 4): That statute provides:

> "(a) The following shall be nationals and citizens of the United States at birth:
>
> (1) a person born in the United States, and subject to the jurisdiction thereof;
>
> (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian or other aboriginal tribe . . ." (Emphasis supplied).

The Respondent has contended below that this statute purports to confer citizenship on Indians who are not subject to the jurisdiction of the states and not subject to taxation in contravention of the 14th Amendment as interpreted by the Supreme Court in *Elk v. Wilkins.* Consequently, the constitutionality of the statute, in light of the 14th Amendment, is placed directly in issue.

Since *Elk v. Wilkins* this Court and lower courts have continually ruled that the state and federal courts do not have jurisdiction over the Reservation Indians and that they are generally not subject to taxation. *United States v. Kagama,* 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886); *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959); *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed. 2d 165 (1965); *McClanahan v. State Tax Commission,* .....U.S....., 93 S.Ct....., 36 L.Ed. 2d 129 (1973); *Commissioner of Taxation v. Brun,* 174 N.W. 2d 120 (Minn. 1970); *Martin v. Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972). These decisions have only emphasized that there is no jurisdiction over the Reservation Indian and that he is not taxed within the meaning of the 14th Amendment. Thus, this court must review the question of citizenship under the 14th Amendment in light of this trend.

Because of the limited jurisdiction which the states have over Reservation Indians, the question of residence also presents substantial constitutional questions. Can one who is not subject to

the civil and criminal processes of a jurisdiction serve as a public officer within that jurisdiction? The public policy behind the residency requirement is to assure that one holding office has a valid interest in that government which he proposes to control and to assure that he is subject to the civil and criminal process of that jurisdiction as are other public officials and the general population within that jurisdiction. *See State v. Van Beek,* 87 Iowa 569, 54 N.W. 525 (1893). The Arizona Supreme Court has stated that Indian Tribes are less amenable to suit than a *foreign nation. Morgan v. Colorado River Indian Tribe,* 103 Ariz. 425, 443 P.2d 421 (1968) (fn. at 428). Thus, the current legal status of the Reservation Indian is totally contrary to the concept of his being a resident of a state or county. Only this court can effectively reconcile the nonsequitur relationship of the Indian's membership in a soverign nation with that of residency within a county and state.

II. *TAXATION*

200 years ago this country fought a Revolutionary War with England over the unjust and vicious principle of taxation without representation. The petitioners and 7,000 other non-reservation residents of Apache County face this same fatal principle of taxation without representation as well as representation without taxation. The Navajo Reservation Indians have recently filed suit in the Arizona Federal Court asking that the Supervisoral Districts of Apache County be redistricted under the one-man, one-vote rule which will assure the Navajos of complete control of the Board of Supervisors and consequently county taxes. (Complaint attached as appendix D of which the court may take judicial notice). We can conceive of no principle which is more offensive to the fundamentals of the American Democratic Process than to permit those in public office to be immune from the taxes they impose upon their constituents. Since those who are subject to property tax constitute a small minority of the population of the

county, the taxpayers will not have the power to vote out of office by democratic process those who impose the tax. The taxpaying residents will be the subjects of a colonial power — the Navajo Nation — and taxed without representation in the same fashion England imposed taxes upon the American Colonies. While the Constitution contains no specific guarantee against taxation without representation, it must be implied in the Due Process Clause since if the power to tax cannot be controlled by those who are subject to the tax, then the property of the taxpayer may be taken without due process of law. It devolves upon this Court to determine whether or not the principle upon which this nation was founded is protected by our Constitution.

In addition, the imposition of taxes by the respondent upon only non-Indians violates the Equal Protection Clause of the Constitution. The personal and real property which Shirley owns on the reservation is immune from tax even though all non-Indian residents of Apache County are required to pay tax on their real and personal property *whether it is located on or off the Reservation;* Shirley is immune from Arizona State income tax earned on the Reservation although all other citizens must pay income tax *whether earned on or off the Reservation.*

The question of discrimination in favor of Indians *based upon race* has never been previously presented to or considered by any court; it can be satisfactorily resolved only by the highest federal court.

III. *JURISDICTION*

Prior rulings by this and lower courts severely limiting the criminal and civil jurisdiction over Reservation Indians pose serious questions not previously considered by this court, namely, how does a governmental entity protect itself and its constituency from the criminal and civil nonfeasance or malfeasance of a public officer when the declared legal status of that official places him beyond the jurisdiction of the courts and laws of that governmental entity?

Should the respondent engage in malfeasance or nonfeasance in office, the taxpayers, the Board of Supervisors and the State itself would not be able to obtain personal jurisdiction over the respondent while he remains on the Reservation, his residence. *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959); *Martin v. Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972). Second, of the act of malfeasance or nonfeasance occurs on the Reservation, there will be no subject matter jurisdiction over the case. *Williams v. Lee, supra.* Finally, a judgment against the respondent would be a nulity, as there would be no jurisdiction to execute upon the respondents' property to satisfy the judgment. *Commissioner of Taxation v. Brun,* 174 N.W.2d 120 (Minn. 1970).

A few examples of the effect of such jurisdictional limitations are: (1) The bond of a public officer required by A.R.S. § 38-252 would be useless. Indeed, the United States Attorney General has so opined. 18 Op. A.G. 181 (1885) (stating that a Reservation Indian could not hold the office of U.S. Postmaster). (2) A.R.S. § 38-291 (8) and A.R.S. § 38-293 could not be utilized to remove Shirley from office should he commit crimes on the Reservation or remain on the Reservation after committing crimes requiring his removal from office. (3) His office could not be judicially vacated pursuant to A.R.S. § 38-291 in case of Shirley's insanity, absence from the state, violation of official duties or actions which would void his election. (4) The taxpayers or county could not receive judgment or collect sums forfeited by public officers for certain acts under A.R.S § 11-223. (5) A mandamus action could not be brought to compel Shirley to perform his duty in office while on the Reservation.

This court has recently held that taking property without prior notice or hearing is unconstitutional even though the right to recover such property is granted in subsequent proceedings. *Sniadach v. Family Finance Corporation,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct.

1983, 32 L.Ed.2d 556 (1972). *A fortiori,* the taxpayers and Supervisors would be deprived of property without due process when there is no legal process whatsoever to remedy a wrong of a public official. This petition calls upon this Court to determine whether the respondent can undertake the high trust of a public office while he is immune from judicial recourse to which other public officers are subject.

IV. *VIOLATION OF THE CIVIL RIGHTS ACT*

42 U.S.C. § 1981 of the Civil Rights Act provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, *to sue,* be parties, give evidence, and to the full and equal benefit of the laws and proceedings for the securities of persons and property as enjoyed by white citizens, *and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other."* (Emphasis supplied).

The benefits of 42 U.S.C. § 1981 clearly protect the constitutional rights of white Americans as against racial minorities. *Central Presbyterian Church v. Black Liberation Front,* 303 F. Supp. 894 (D. Mo. 1969).

If this court determines that the Indian is not "within the jurisdiction of the United States" then the Civil Rights Act may be inapplicable, but, of course, then Shirley is clearly ineligible for office under the 14th Amendment. If Shirley is within the jurisdiction of this country, then this court must determine the very far reaching question raised by both the taxpayers and Supervisors of whether under the Civil Rights Act a Reservation Indian may hold public office when he is not subject to suit, and to the same "punishment, pains, penalties, taxes, licenses, and exactions of every kind" as are the taxpayers and the other board members.

The violation of the Civil Rights Act and the Equal Protection Clause of the Constitution by Shirley's holding office is vividly demonstrated by the fact that the non-Indian members of the

Board of Supervisors are fully subject to all criminal and civil actions against them, regardless of where they reside in Apache County—whether on or off the Reservation. They are subject to all county or state taxes, and are subject to the same pains, penalties, and exactions of every kind that apply to Whites, Mexican-Americans, Negros and Chinese residents of Apache County. Yet, Tom Shirley, who holds the *identical* office is not subject to a great many of these same pains, penalties, taxes and exactions. Further compounding the inequity, Shirley, as one member of the legislative body of the county, will legislate that these pains, penalties, taxes and exactions shall apply to all county residents except himself and his Navajo Indian constituency.

The courts of this country have not previously been called upon to interpret the Civil Rights Act in light of the Reservation Indian's claim to all rights of citizenship but disclaimer of all responsibilities. This substantial federal question is appropriate for resolution by this Court.

V. *CONCLUSION*

The Indian Reservation is a strange entity conceived and established by our Federal Government. The Reservation Indian, impelled by prior decisions of this court, now occupies a position as a "most favored citizen" unique among all other races and people in this country. A combination of congressional and court action has created a legal status the very essence of which violates the non-Reservation population's Civil Rights and rights to Equal Protection and Due Process of Law. Whenever responsibilities of citizenship, such as taxation and allegiance to courts and law are involved, the Reservation Indian is a member of a "soverign, autonomous nation". However, when the rights of citizenship are at issue, such as voting, holding public office, and the right to federal, state and county tax benefiits, the Reservation Indian is a full-fledged citizen and resident of the nation, state and county. The inconsistency makes reason stare.

The time has come for this court of last resort to resolve these obvious constitutional inequities. Either the Reservation Indian is a full-fledged citizen of the United States and therefore subject to like "punishment, pains, penalties, taxes, licenses, and exactions of every kind" suffered by all other races of people in this country, or, he is a member of a soverign nation with the right to govern his nation and his people, but not to govern those persons in governmental subdivisions to which he owes no allegience and pays no taxes.

The import of this case is of great legal and historical significance. The constitutional issues raised affect thousands of non-Indians living in the vicinity of the Reservations and shall continue to plague the courts until resolved by this high court. These issues have not heretofore been determined by this court with the exception of the decision in *Elk v. Wilkins* which is contrary to the ruling of the court below. Consequently, this case is particularly appropriate for the exercise of this court's discretionary jurisdiction.

For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 1st day of December, 1973.

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APPENDIX A

IN THE SUPREME COURT OF THE

STATE OF ARIZONA

In Banc

TOM SHIRLEY,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF APACHE; LAURANCE T. WREN, JUDGE OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF COCONINO (Sitting in Apache County); THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE, APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR N. LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors, Real Parties in Interest,

Respondents.

} No. 11237

Filed Sept. 7, 1973

SPECIAL ACTION

PRAYER FOR RELIEF GRANTED

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LOCKWOOD, Justice:

This is a special action by Tom Shirley as petitioner against the Apache County Board of Supervisors and certain others for the purpose of vacating the preliminary injunction order issued in an action against Tom Shirley by the respondents in this case, which prevented his assuming the office of Supervisor of Apache County Supervisorial District No. 3, and requiring the Board of Supervisors to certify Shirley as the duly elected County Supervisor of such district.

It appears that Tom Shirley is an enrolled member of the Navajo Indian Tribe, residing within the exterior boundaries of the Navajo Indian Reservation in the State of Arizona and in the boundaries of Supervisorial District No. 3 of Apache County. On November 7th at the general election the petitioner received 3,169 votes for Supervisor of the Apache County Supervisorial District No. 3 as opposed to 1,105 votes received by his opponent, Thomas E. Minyard. Having received a majority of the votes cast, the Board of Supervisors nevertheless failed to certify the petitioner as duly elected. Thomas E. Minyard, the unsuccessful candidate, together with Ted Spurlock, Clair Platt and Jay Reese brought an action against the Apache Board of Supervisors seeking an injunction restraining the Supervisors from issuing a Certificate of Election to Tom Shirley, alleging as grounds therefor that its issuance would violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution and A.R.S. § 11-211, making a person holding any other county or precinct office ineligible to the office of Supervisor.

The petitioner removed the pending action to Federal Court on November 20, 1972 and after some discovery and filing of various legal memoranda and oral argument, on March 21, 1973 the matter was remanded by the Judge of the United States District Court for the District of Arizona, to the Arizona Superior Court for determination.

The petitioner filed a motion for judgment on the pleadings and to vacate the temporary restraining order and Minyard filed a motion for summary judgment as well as a motion for preliminary injunction. The motion for preliminary injunction by Minyard was granted by the Superior Court on the grounds that (1) Minyard did not have any other adequate remedy at law; (2) Minyard had established a prima facie case that he would prevail on the merits of the matter since: (a) petitioner was immune from service of civil process while on the Navajo Reservation; (b) petitioner did not own any real or personal property subject to taxation by the State of Arizona, and (c) petitioner was a trustee for the Apache County School District No. 18 in contravention of A.R.S. § 11-211 (A) and A.R.S. § 38-296 (A) on November 7, 1972, a position from which he resigned on November 22, 1972, and (3) Minyard would suffer irreparable harm and injury if the preliminary injunction was not granted.

This court has held that Indians, even though living on a reservation are entitled to vote. Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948). Shirley, a member of the Navajo Tribe living on that part of the Navajo Reservation within Apache County Supervisorial District No. 3 was therefore a qualified elector of the Supervisorial District.

The county officers are created by Article 12 of the Arizona Constitution. Section 3 thereof names the county officers, including Supervisor, and § 4 provides that: "The duties, powers and qualifications of such officers shall be as prescribed by law." The Arizona Legislature has provided the qualifications of Supervisor in A.R.S. § 11-211 (A). Therein it is provided:

> "* * * a board of supervisors shall consist of three members * * * who shall be qualified electors of their supervisorial district and who shall be elected at a general election at which the president of the United States is elected."

No other qualifications have been "prescribed by law". The Arizona Legislature was thus given authority to prescribe the qualifications of Supervisor which it has done. In the absence of

further legislation, the Court is powerless to add to or detract from the qualifications of such officer.

It is also provided in A.R.S. § 11-211 (A) that "No person holding any other county or precinct office is eligible to the office of supervisor.

Since Tom Shirley resigned from the Office of Trustee of Apache County School District No. 18 before the time for assuming the office of Supervisor in January of 1973, he was no longer a trustee and therefore became eligible to hold the office of Supervisor pursuant to A.R.S. § 11-211 (A).

The two statutes upon which respondents rely are A.R.S. § 38-296 and A.R.S. § 11-211. The one reads so far as pertinent:

> § 38-296. Limitation upon filing for election by incumbent of elective office; exceptions
>
> "A. No incumbent of an elective office whether holding by election or appointment, shall be eligible for nomination or election to any office other than the office so held, nor shall the nomination papers of such incumbent be accepted for filing.
>
> * * *
>
> "D. A person violating any provision of this section is guilty of misfeasance in office and the *office held by such person shall be declared vacant.*" (Emphasis added.)

and is general in nature, applying to all public offices.

The second reads:

> § 11-211. Membership; qauifications; term
>
> "A. There shall be in each county * * * having a population of less than two hundred thousand as determined by the latest United States decennial census, a board of supervisors shall consist of three members, * * * who shall be qualified electors of their supervisorial district and who shall be elected at a general election at which the president of the United States is elected. They shall enter upon their duties on January 1 subsequent to their election, and shall hold office for four years. No person holding any other county or precinct office is eligible to the office of supervisor."

and is special in nature, referring specifically to the Office of

County Supervisor. It is true that in case of conflict, the special statute will apply over the general. However, it is also a rule that in applying two statutes, the court will attempt to harmonize both. State Land Dept. v. Tucson Rock and Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971); State ex rel Larson v. Farley, 106 Ariz. 119, 471 P.2d 731 (1970); City of Mesa v. Salt River Project Agr. Imp. Dist., 92 Ariz. 91, 373 P.2d 722 (1962); Peterson v. Flood, 84 Ariz. 256, 326 P.2d 845 (1958).

In this case, the obvious intent of the legislature was to prohibit the holding of another county or precinct office beside that of Supervisor.

The case of McCarthy v. State, 55 Ariz. 328, 101 P.2d 449 (1940) involved these statutes. Peterson, Foote and Frye were County Supervisors. Peterson's resignation was accepted by the other two on June 23, 1939. On the same day, by virtue of the existing statute, Foote and one Laveen, the County Recorder, for the purpose of filling the vacancy created by Peterson's resignation, met and nominated McCarthy, who, with Supervisor Foote, was a citizen member of the Welfare Board, both serving by appointment of the Board of Supervisors. (The Welfare Board consisted of one supervisor and two citizen members, appointed by the Board of Supervisors.) Frye nominated one Marlar. By a vote of Foote and Laveen, McCarthy was appointed, and on the same day took the oath of office and filed a bond, and assumed the duties of the office.

On June 23rd McCarthy filed his resignation as member of the Welfare Board. At a meeting of the Welfare Board, with Foote and Jamison present, the resignation was unanimously accepted, but not filed with the Board of Supervisors until June 24th. No affirmative action was taken by the Board of Supervisors. At a special meeting of the Board of Supervisors comprised of Foote, Frye and McCarthy the latter's resignation was presented by the Clerk of the Board and spread upon the minutes of that meeting.

On July 3rd at a regular meeting of the Board of Supervisors, Foote and McCarthy present, Frye absent, one Stanford was appointed a member of the Welfare Board, qualified, and promptly assumed his duties. On the same day Foote and County Recorder Laveen again convened for the purpose of selecting a member of the Board of Supervisors to fill the vacancy created by Peterson's resignation, and again appointed McCarthy who thereupon again took the oath of office and filed a new bond.

The state contended in a quo warranto action that McCarthy was ineligible for appointment to the Board of Supervisors on either of the two dates he was purportedly appointed for the reason that he was still a member of the Welfare Board, and his resignation had not been lawfully accepted, and his appointment was without authority of law and consequently null and void. The case was decided on the basis of the predecessors of the two statutes here involved.

The court held that under the eligibility clause of § 766, R.C.A. (1928) (here A.R.S. § 11-211) member of the Welfare Board was a *county* officer. It held that under § 94 R.C.A. (1928) (now § 38-296, A.R.S. (1956)) requiring that "his resignation, and lawful acceptance thereof" had not occurred by the events described above in the following language:

> "A different situation would exist had Supervisor Frye attended the meeting and voted with Supervisor Foote for Stanford's appointment, as that would have been tantamount to an implied acceptance of appellant's resignation under the rules above stated. * * * [U]nder the statute as it now exists the office does not become vacant until the resignation is lawfully accepted." Id. at 337-338.

Here Tom Shirley submitted his resignation from the office of School Board Trustee on November 22, 1972 to the County School Superintendent of Apache County, who accepted it in writing on November 23rd, before Shirley could ever assume the office of County Supervisor, (for which no vacancy occurred prior to January 1st, the date for assuming of office after the

former member of the Board's incumbency terminated). The language of the statute is carefully chosen "No person holding any other county or precinct office is eligible *to the office of supervisor*" not "to be nominated or elected" to the office of Supervisor. Thus § 11-211, A.R.S. is satisfied by removing the barrier to eligibility for the office of Supervisor before the date for which the office became vacant.

If it were in fact a "public office," the petitions for nomination or election should not have been accepted. Having been, and having been submitted to a vote of the electors, paragraph D of § 38-296, supra, would apply and the office of school board trustee would be declared vacant upon the acceptance by the Clerk of the Board of Supervisors of the petitions for nomination or election to the Board of Supervisors. The office of school board member would be declared vacant. The ensuing election would therefore be valid.

If § 38-296 is to be harmonized with § 11-211, Shirley's nomination or election papers should not have been accepted for filing, but they were, upon advice of the Attorney General that School Board Member was not an office proscribed under § 11-211, A.R.S. It is recognized that disqualifications provided by the legislature are construed strictly and there is a presumption in favor of the eligibility of one who had been elected or appointed to public office. McCarthy v. State, supra.

In State v. Myers, 89 Ariz. 167, 359 P.2d 759 (1961) this Court construed a constitutional provision making a member of the legislature ineligible to hold any other office in the following words:

> "[N]o member of the legislature, *during the term for which he shall have been elected,* * * * shall be eligible to hold any other office or be otherwise employed by the State of Arizona, or, any county, or incorporated city or town thereof * * *." (Emphasis added.)

A legislator who had been proclaimed elected to a term in the twenty-fifth legislature, but who refused to accept a seat therein,

was declared by this Court not rendered *ineligible* to accept the office of Judge of the Superior Court thereafter. By his own action in refusing to accept the term for which he had been elected he rendered himself eligible to accept appointment to another office. State v. Myers, supra.

We think it would be wooden indeed, to hold that Tom Shirley could not remove his ineligibility before the term of office began. As stated in State ex rel Nelson v. Jordan, 104 Ariz. 193, 450 P.2d 383 (1969):

> "In this a democratic society, we are irretrievably wedded to the principle that, subject to *constitutional* limitations, the will of the majority as expressed in free elections must prevail." (Emphasis added.)

As a matter of fact, it is extremely doubtful if a member of a school board could be considered holding a "public office".

The petitioner was a trustee of the Apache County School *District* No. 18 prior to and at the time of his election as a member of the Board of Supervisors of Apache County. The respondents contend that by holding an elective office, school trustee, the petitioner was ineligible to be elected to any other office. A.R.S. § 38-296 A provides:

> "No incumbent of an elective office, whether holding by election or appointment, shall be eligible for nomination or election to any office other than the office so held, nor shall the nomination papers of such incumbent be accepted for filing."

The term "elective office," however, is limited by the definitions found in A.R.S. § 38-101 which provides:

> "In this title, unless the context otherwise requires:
> "1. 'Office', 'board' or 'commission' means any office, board or commission of the state, or any political subdivision thereof, the salary or compensation of the incumbent or members of which is paid from a fund raised by taxation or by public revenue."

The type of office which is defined in subsection 1 of A.R.S. § 38-101 is that for which the salary or compensation is paid

from a fund raised by taxation or by public revenue. A school trustee does not receive compensation from the public treasury. Such an office is one of public service or trust, and it is not the type of office contemplated under the above statutes. The distinction between an office of profit and an office of trust has long been recognized in Arizona. See McCluskey v. Hunter, 33 Ariz. 513, 266 P. 18 (1928). Nor is it a 'county' or a 'precinct' office, it is at most a 'district' office. The petitioner was therefore not holding an elective office within the meaning of A.R.S. § 38-296 A, and he was eligible for nomination and election as a member of the Board of Supervisors of Apache County.

Concerning the question of whether Tom Shirley is immune from service of civil process by residing on the reservation, we fail to see how this could affect his office. He is subject to recall without service of process as any other officer, Article 8, Constitution of Arizona. His office shall be deemed vacant if any number of events occur, including ceasing to discharge the duties of the office for a period of three consecutive months, except when prevented by sickness, or absence from the State by permission of the Legislature. He is required to have a bond conditioned that he shall faithfully perform all official duties as required by law. A.R.S. § 38-251.

We cannot find any violation of the Fifth or Fourteenth Amendments on this account. That Tom Shirley is not a taxpayer has been declared no obstacle to voting or holding office. The Supreme Court of the United States has resolved this question in the following cases: City of Phoenix v. Kolodziejski, 399 U.S. 204, 90 S.Ct. 1990, 26 L.Ed.2d 523 (1970); Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969); Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969).

It is therefore ordered that the preliminary injunction be quashed and the Superior Court of Apache County enter its judgment on the pleadings, directing that the Board of Supervi-

sors of Apache County issue its certificate of election declaring Tom Shirley the duly elected Supervisor of Supervisorial District No. 3 of Apache County, Arizona, and for petitioner's costs against Thomas E. Minyard, Ted Spurlock, Clair Platt and Jay Reese.

.....

Lorna E. Lockwood, Justice

CONCURRING:

.....

Jack D. H. Hays, Chief Justice

.....

James Duke Cameron, Vice Chief Justice

.....

Fred C. Struckmeyer, Jr., Justice

.....

William A. Holohan, Justice

APPENDIX B

SUPREME COURT

STATE OF ARIZONA

October 3, 1973

TOM SHIRLEY,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF APACHE; LAURANCE T. WREN, JUDGE OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF COCONINO (Sitting in Apache County); THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE, APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR N. LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors, Real Party in Interest,

Respondents.

Supreme Court No. 11237 Apache County No. 4727

Filed Oct. 2, 1973

The following action was taken by the Supreme Court of the State of Arizona on October 2, 1973 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing — Denied.

"FURTHER ORDERED: Stay of Mandate — Denied."

CLIFFORD H. WARD, Clerk

By Mary Ann Dixon

Deputy Clerk

TO: Paul F. Eckstein, Esq., Brown, Vlassis & Bain, P. A., 222 North Central, 9th Floor, Phoenix, Arizona 85004

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Hon. Laurance T. Wren, Judge of the Superior Court, Coconino County Courthouse, Flagstaff, Arizona 86001

Hon. D. L. Greer, Presiding Judge, Apache County Courthouse, St. Johns, Arizona 85936

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APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

THOMAS E. MINYARD, TED SPURLOCK, CLAIR PLATT and JAY REESE, Plaintiffs, vs. APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, and ARLO B. LEE, and BLAINE SLADE constituting the members thereof; MARGARET LEE in her official capacity as Clerk of the Apache County Board of Supervisors and TOM SHIRLEY, Defendants.	No. 4727 JUDGMENT

Filed Oct. 12, 1973

The Supreme Court of the State of Arizona having rendered its opinion on September 7, 1973, and having issued its Mandate on October 2, 1973 in No. 11237, the same being a Special Action brought *sub nom:*

"IT IS THEREFORE ORDERED that the Preliminary Injunction be quashed and the Superior Court of Apache County enter its Judgment on the pleadings directing that the Board of Supervisors of Apache County issue its Certificate of Election declaring Tom Shirley the duly elected Supervisor of Supervisorial District No. 3 of Apache County, Arizona, and for petitioner's costs against Thomas Minyard, Ted Spurlock, Clair Platt, and Jay Reese."

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant, said Board of Supervisors issue its Certificate

of Election declaring the defendant TOM SHIRLEY the duly elected Supervisor of Supervisorial District No. 3 of Apache County, Arizona.

IT IS THEREFORE ORDERED that the Complaint is dismissed with prejudice.

IT IS FURTHER ORDERED that plaintiffs THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, and JAY REESE shall pay defendant TOM SHIRLEY'S costs in this action, said amount to be determined by the Court upon application thereto.

DONE IN OPEN COURT this 11th day of October, 1973.

LAURANCE T. WREN, Judge

APPENDIX D

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

LESLIE E. GOODLUCK, KENNETH CHEE, STEVEN ASHLEY, SR., STANLEY E. ASHLEY, and ANDERSON YAZZIE, Plaintiffs, v. APACHE COUNTY; and MARGARET LEE, ARTHUR N. LEE, LARRY STRADDLING and JAMES A. McDONALD, individually and as clerk and members of the Apache County Board of Supervisors, Defendants.	No. Civ 73-626 PCT WEC COMPLAINT (CIVIL RIGHTS)

Filed Oct. 15, 1973

1. This is a civil action for injunctive and declaratory relief to prevent the deprivation under color of state law of plaintiffs' rights, privileges and immunities secured by the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. §1343.

2. Each plaintiff is a resident of Supervisorial District 3 of Apache County, Arizona and is a duly registered and qualified voter under the laws of Arizona.

3. Apache County is a unit of local government and body politic and corporate of the State of Arizona. Defendant Margaret Lee is the Clerk of the Apache County Board of Supervisors. The other defendants are the current members of the Apache County Board of Supervisors. The Board exercises general governmental authority within the County. It is comprised of three members, one elected from each of the three supervisorial districts of the County.

4. According to the 1970 Decennial Census, the population of the three supervisorial districts of Apache County is as follows:

District No. 1	1,589
District No. 2	3,905
District No. 3	26,984

These districts were established by defendants in April 1972.

5. The Fourteenth Amendment to the Constitution protects plaintiffs' votes from debasement resulting from malapportioned voting districts. This principle is commonly referred to as the "one man - one vote" rule, and it applies to the Apache County Board of Supervisors.

6. The acts of defendants in establishing the supervisorial districts of Apache County debase the value of plaintiffs' votes in violation of their rights under the Fourteenth Amendment and under 42 U.S.C. §§1981 and 1983.

7. Plaintiffs have no plain, speedy or adequate remedy at law and are entitled to an injunction requiring the reapportionment of Apache County into supervisorial districts with substantially equal population and requiring elections pursuant to said redistricting at the earliest practicable date.

WHEREFORE plaintiffs pray that this Court:

a. Assume jurisdiction of this action.

b. Issue an injunction ordering:

(1) That defendants submit to the Court a redistricting plan dividing Apache County into Supervisorial districts of substantially equal population;

(2) That failing such plan the Court accept a plan to be submitted by plaintiffs;

(3) That a redistricting plan dividing Apache County into Supervisorial Districts of substantially equal population be ordered into effect immediately;

(4) That the Court order supervisorial elections pursuant to said plan to be held during 1974.

c. Declare that the present Supervisorial Districts of Apache County are unlawful and violative of the Fourteenth Amendment and of 42 U.S.C. §§1981 and 1983.

d. Award costs of suit, attorneys' fees and such other relief as is just.

Dated: October 12, 1973

Respectfully submitted,

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Post Office Box 306
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Attorneys for Plaintiffs

APPENDIX E

8 U.S.C. § 1401:

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided,* That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided,* That

any periods of honorable service in the Armed Forces of the United States, or periods of employment with the United States Government or with an international organization as that term is defined in section 288 of Title 22 by such citizen parent, or any periods during which such citizen parent is physically present abroad as the dependent unmarried son or daughter and a member of the household of a person (A) honorably serving with the Armed Forces of the United States, or (B) employed by the United States Government or an international organization as defined in section 288 of Title 22, may be included in order to satisfy the physical-presence requirement of this paragraph. This proviso shall be applicable to persons born on or after December 24, 1952, to the same extent as if it had become effective in its present form on that date.

(b) Any person who is a national and citizen of the United States under paragraph (7) of subsection (a) of this section shall lose his nationality and citizenship unless—(1) he shall come to the United States and be continuously physically present therein for a period of not less than two years between the ages of fourteen years and twenty-eight years; or (2) the alien parent is naturalized while the child is under the age of eighteen years and the child begins to reside permanently in the United States while under the age of eighteen years. In the administration of this subsection absences from the United States of less than sixty days in the aggregate during the period for which continuous physical presnce in the United States is required shall not break the continuity of such physical presence.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934; *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

(d) Nothing contained in subsection (b) of this section, as amended, shall be construed to alter or affect the citizenship of

any person who has come to the United States prior to October 27, 1972, and who, whether before or after October 27, 1972, immediately following such coming complies or shall comply with the physical presence requirements for retention of citizenship specified in subsection (b) of this section prior to its amendment and the repeal of section 1401b of this title.
As amended Oct. 27, 1972, Pub.L. 92—584, §§ 1, 3, 86 Stat. 1289.

42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of the laws and proceedings for the securities of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

A.R.S. § 38-201:

A. Every officer shall be not less than eighteen years of age, a citizen of the United States and a resident of this state.

B. No person is eligible to any office, employment or service in any public institution in the state, or in any of the several counties thereof, of any kind or character, whether by election, appointment or contract, unless he is a citizen of the United States, but the provisions of this subsection shall not apply to the employment of any teacher, instructor or professor authorized to teach in the United States under the teacher exchange program as provided by federal statutes or the employment of university or college faculty members.

C. A person who is unable to speak, write and read the English language is not eligible to hold a state, county, city, town or precinct office in the state, whether elective or appointive, and no certificate of election or commission shall issue to a person so disqualified. As amended Laws 1959, Ch. 33, § 2; Laws 1972, Ch. 146, § 78.

A.R.S. § 11-211:

A. There shall be in each county having a population of two hundred thousand or more as determined by the latest United States decennial census a board of supervisors consisting of five members who shall be qualified electors of their supervisorial district, and who shall be elected at a general election at which the president of the United States is elected. In each county having a population of less than two hundred thousand as determined by the latest United States decennial census, a board of supervisors shall consist of three members, except as prescribed by subsection B, who shall be qualified electors of their supervisorial district and who shall be elected at a general election at which the president of the United States is elected. They shall enter upon their duties on January 1 subsequent to their election, and shall hold office for four years. No person holding any other county or precinct office is eligible to the office of supervisor.

SUPREME COURT, U. S.
MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-860

THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE, APACHE COUNTY BOARD OF SUPERVISORS and TOM SHIRLEY, LARRY STRADLING and ARTHUR LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors,

Petitioners,

vs.

TOM SHIRLEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Brief of Respondent in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-860

THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE, APACHE COUNTY BOARD OF SUPERVISORS and TOM SHIRLEY,* LARRY STRADLING and ARTHUR LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors,

Petitioners,

vs.

TOM SHIRLEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

Brief of Respondent in Opposition

OPINION BELOW

The opinion of the Supreme Court of Arizona is not yet officially reported, but is unofficially reported in 513 P.2d 939. Copies of this opinion, the Order denying rehearing and

*The caption of the Petition in this case is incorrect in that it designates James A. McDonald as a member of the Apache County Board of Supervisors. At the time the Petition was filed Tom Shirley was the Supervisor. With this substitution, the case is left in the anomalous posture of Tom Shirley suing Tom Shirley and perhaps explains why the caption was not changed.

the judgment of the lower court carrying out the mandate of the Arizona Supreme Court are appended to the Petition.

JURISDICTION

Petitioners state that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Inasmuch as this section applies to petitions for certiorari from *Federal courts of appeal* and the Petition is directed at the action of the Arizona Supreme Court, jurisdiction clearly does not lie under 28 U.S.C. § 1254(1). Moreover, under Respondent's reading of the applicable statutes, Petitioners have not presented the issues in a manner sufficient to give this Court jurisdiction under any statute. To be sure, the mere assertion that a Federal or State statute is unconstitutional would appear to give this Court jurisdiction pursuant to 28 U.S.C. § 1257(3), but, as will appear more fully below, the "constitutional" issues raised by Petitioners are more imagined than real.

QUESTIONS PRESENTED

1. Is a Navajo Indian who resides on the Navajo Indian Reservation a citizen of the United States within the meaning of 8 U.S.C. § 1401(a)(2)?

2. Do the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States require the State of Arizona to prohibit a Navajo Indian who resides on the Navajo Indian Reservation from holding the Office of County Supervisor?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners claim that this case properly raises issues under the Fifth and Fourteenth Amendments of the Constitution of the United States. Despite Petitioners' vigorous efforts to turn this case into a constitutional *cause celebre*,

the controversy can be properly resolved without resort to the Constitution.

STATUTES INVOLVED

The relevant Federal and State statutes are cited in the Petition at page 4 and set forth in the appendix thereto.

STATEMENT OF THE CASE

In the summer of 1972, Respondent Tom Shirley, a qualified elector of the State of Arizona and an enrolled member of the Navajo Tribe residing within the exterior boundaries of the Navajo Indian Reservation, decided to run for the Office of County Supervisor for Apache County Supervisorial District No. 3 which includes the area where Respondent resides. Respondent filed the necessary nominating petitions, and in September, 1972, won the Democratic Party primary. On November 7, 1972, Respondent was elected County Supervisor for Apache County Supervisorial District No. 3, receiving 3,169 votes to 1,105 received by Thomas A. Minyard, the losing candidate and also one of the Petitioners herein. Despite this overwhelming victory at the polls, through the various acts and omissions of Petitioners as set forth below, Respondent was prevented from serving in the office to which he was duly elected until October 15, 1973.

On November 13, 1972, the Board of Supervisors of Apache County met, as it is required to do under Arizona law, for the purpose of canvassing the results of this and other general elections in Apache County held the previous week. The meeting lasted less than a couple of hours and in fact was adjourned without a Certificate of Election being issued to Respondent or any other person.

Taking advantage of this adjournment, Petitioners Thomas E. Minyard, Ted Spurlock, Clair Platt and Jay Reese (hereinafter collectively referred to as "Minyard") (a) commenced an action in the Superior Court of the State of Arizona in and for the County of Apache, entitled *Thomas E. Minyard, et al. v. Apache County Board of Supervisors, et al.* (Action No. 4727 in the Superior Court of the State of Arizona in and for the County of Apache) to prevent Respondent from being certified as the duly elected County Supervisor for Apache County Supervisorial District No. 3 and (b) obtained an *ex parte* temporary restraining order from the Honorable D. L. Greer, Judge of the Superior Court of the State of Arizona in and for the County of Apache, restraining the members of the Board of Supervisors of Apache County and the Clerk thereof from issuing to Respondent a Certificate of Election to the Office of County Supervisor for Apache County Supervisorial District 3. After the restraining order was obtained, the Apache County Board of Supervisors resumed its meeting on the next day (November 14, 1972) and issued Certificates of Election to all *other* County candidates elected in the November 7, 1972 general election.

The gravamen of Minyard's complaint was that Respondent, a Navajo Indian living on the Navajo Reservation, should be prohibited from holding public office because he "is immune from Service of Process and is not subject to the jurisdiction of state or federal courts of Arizona, and for the further reason that [Respondent] is not subject to state or county taxation nor are the overwhelming majority of his constituents" as a result of which, it is alleged, his holding of the office "would infringe upon and violate the constitutional rights of [Minyard] by violating the due proc-

ess clause of the 14th and 5th Amendments of the United States Constitution." (Complaint—Par. 3.)

Because of the Federal constitutional issues which appeared on the face of the complaint, Respondent removed the pending action to Federal Court by filing a Petition for Removal on November 20, 1972. On December 11, 1972, Minyard filed a Motion for Remand to the Arizona Superior Court, and, after some discovery, the filing of various legal memoranda and oral argument, on March 21, 1973, the Honorable C. A. Muecke, Judge of the United States District Court for the District of Arizona, granted Minyard's Motion for Remand, concluding "that as presented this case is inappropriate for determination by this Court since interpretation of a State Statute not necessarily involving a constitutional issue was involved. Thus, assuming jurisdiction, this case is ripe for abstention."

On April 16, 1973, Respondent filed a Motion for Judgment on the Pleadings and to Vacate Temporary Restraining Order. In response to this motion, Minyard filed a Motion for Summary Judgment as well as a Motion for Preliminary Injunction. On April 24, 1973, the Honorable Laurance T. Wren, Judge of the Superior Court of the State of Arizona, sitting for the Honorable D. L. Greer (who had been previously disqualified), granted Minyard's Motion for Preliminary Injunction in order to "preserve the status quo" and directed Minyard's attorneys to prepare the necessary formal order. Thereafter, on May 24, 1973, Judge Wren signed the Findings of Fact, Conclusions of Law and Preliminary Injunction and the Preliminary Injunction Order preliminarily enjoining Petitioners Apache County Board of Supervisors, the members thereof and its Clerk from issuing a Certificate of Election for County Supervisor of Apache County Supervisorial Dis-

trict No. 3 to Respondent, purportedly on the grounds, *inter alia*, that:

(a) Minyard did not have an adequate remedy at law;

(b) Minyard had established a *prima facie* case that he would prevail on the merits of the matter since:

(i) Respondent was immune from service of civil process while on the Navajo Reservation;

(ii) Respondent did not own any real or personal property subject to taxation by the State of Arizona; and

(c) Minyard would suffer irreparable harm and injury if the Preliminary Injunction was not granted.*

From this Preliminary Injunction, Respondent sought relief by Special Action from the Arizona Supreme Court.

On May 29, 1973 Respondent filed his Petition for a Special Action with the Arizona Supreme Court. On that same date Chief Justice Jack D. H. Hays ordered the Petitioners to show cause on June 12, 1973 why the relief requested in the Petition — the seating of Respondent as a county supervisor — should not be granted. On June 6, 1973 Petitioners' answering memorandum was filed with the Arizona Supreme Court and on June 12, 1973 oral argument was heard by the Arizona Supreme Court.

Almost three months later, on September 7, 1973, the Arizona Supreme Court granted the relief sought by Respondent and in doing so recognized that Respondent had fully complied with the requirements prescribed by law,

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*Interestingly enough, although Petitioners requested Judge Wren to conclude that Respondent was not a citizen, he refused to do so and in fact found that Respondent was a qualified elector, thus implicitly concluding that he was also a citizen. Accordingly, there is no court—not even a trial court in the State of Arizona—which has held that Respondent is not a citizen.

e.g., he was a qualified elector of the supervisorial district which he sought to represent pursuant to A.R.S. § 11-211 (A). Petitioners sought a rehearing and stay and on October 2, 1973 the Arizona Supreme Court denied the motion for rehearing as well as the request for a stay and thereupon the Court's mandate issued. On October 12, 1973 the Judgment was entered by the Apache County Superior Court requiring that a Certificate of Election be awarded to Respondent.

It was not until October 15, 1973, over eleven months after he had won the election in question, that Respondent took his rightful place on the Board of Supervisors of Apache County, Arizona.

ARGUMENT

Shorn of all slogans and irrelevancies, the gravamen of Petitioners' claim is that a Navajo Indian who resides on the Navajo Indian Reservation should be constitutionally prohibited from holding public office in the State of Arizona even though he may fully comply with all the statutory requirements for the office. However inappropriate it was for Petitioners to request that the Arizona courts rewrite the statutory requirements for public office, it is even more so to make such a request of the Supreme Court of the United States.

What Petitioners really complain of is that for the first time a person who resides on an Indian Reservation has succeeded to county office in a county which had theretofore been exclusively controlled by a non-Indian minority. If Petitioners are intent on preserving their political power, the appropriate appeal is not to the Supreme Court of the United States but rather (1) to the electorate through the established electoral system or (2) to the legislature of the

State of Arizona to redraw the County lines to exclude those voters who they consider their political antagonists (that is, to exclude those portions of the County which contain Reservation land). Just such a bill to redraw the County line was introduced in the Arizona State Legislature last year and is reprinted in the Appendix hereto.

If there is an equal protection or due process claim here, it is that Respondent was denied the public office to which he was elected for ten months and that others like him have been, over a period of one hundred years, systematically and consciously prohibited from voting and holding public office.

I. The Decision Below Is Clearly Correct.

A. A Reservation Indian Is a Citizen of the United States Pursuant to 8 U.S.C. § 1401(a)(2) and a Resident of the State of Arizona.

As incredible as it may appear in the year 1973, the thrust of Petitioners' argument is that Indians who reside on reservations established by the United States are not citizens and therefore ineligible to vote and hold public office. From the very first pleadings in this case, Petitioners have cited *Elk v. Wilkins*, 112 U.S. 94 (1884) for the proposition that as a matter of constitutional law Indians are not and cannot be citizens of the United States.* No matter how many times Petitioners may say so, *Elk v. Wilkins* did *not* hold that Indians are not and cannot be citizens of the

*Respondent argued, and evidently the Arizona Supreme Court concurred, that for Petitioners to prevail, *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948) (holding that reservation Indians were entitled to vote in State elections) had to be overruled. In refusing to overrule *Harrison v. Laveen*, the Arizona Supreme Court *implicitly* found that reservation Indians are citizens of the United States, for one cannot vote under Arizona law unless he is a citizen of the United States and a resident of Arizona. See A.R.S. § 16-101.

United States as a matter of constitutional law. *Elk v. Wilkins* merely held that in the *absence* of express conferral of citizenship by Congress, an Indian could not become a citizen merely by voluntarily rejecting his tribal affiliation. Quoting from Mr. Justice Taney's opinion in *Scott v. Sandford*, 60 U.S. 691 (1856), the Court in *Elk v. Wilkins* noted that Indians "may without doubt, like the subjects of any foreign government, be naturalized by authority of congress, and become citizens of a state, and of the United States." 112 U.S. at 101. This is precisely what happened in 1924 when Congress passed the Citizenship Act, 43 Stat. 253 (8 U.S.C. § 1401).

As noted in the Petition, 8 U.S.C. § 1401(a)(2) expressly declares Indians to be citizens of the United States, and while Petitioners may prefer to ignore the state of the law since 1884, every court that has had occasion to consider the matter has held that Reservation Indians are citizens of the United States. See *Halbert v. United States*, 283 U.S. 753 (1931), *Ex Parte Green*, 123 F.2d 862 (2nd Cir. 1941), *Totus v. United States*, 39 F.Supp. 7 (E.D.Wash. 1941). Even the Arizona Superior Court which prevented Respondent from taking his seat for ten months did not agree with Petitioners' argument that Respondent is not a citizen of the United States.

Not only are American Indians citizens but also they are residents of the state in which they reside. *United States v. Nice*, 241 U.S. 591 (1916), *Boyd v. Nebraska*, 143 U.S. 135 (1892), *Porter v. Hall*, 34 Ariz. 408, 271 P. 411 (1928),* *Harrison v. Laveen, supra*, and *Deere v. New York*, 22 F.2d 851 (N.D.N.Y. 1927). In any event, the question of whether

*While the *Porter* case held that Indians did not have the right to vote, this decision was not based upon citizenship or residency grounds but rather upon the mistaken belief that Indians were persons under guardianship. 271 P. at 415-419. Indians were given the right to vote in Arizona in 1948.

a Reservation Indian is a resident of the State of Arizona is not a Federal constitutional question and is not properly before this Court.

B. The Equal Protection and Due Process Clauses of the Fourteenth Amendment Do Not Require the State of Arizona to Prohibit a Reservation Indian from Holding the Office of County Supervisor.

A.R.S. § 11-211(A) sets out the affirmative requirements for holding the office of County Supervisor. That section provides as follows:

> ". . . In each county having a population of less than two hundred thousand as determined by the latest United States decennial census, a board of supervisors shall consist of three members . . . *who shall be qualified electors of their supervisorial district* and who shall be elected at a general election at which the president of the United States is elected." [Emphasis supplied.]

While Petitioners do not specifically request this Court to find that A.R.S. § 11-211(A) is unconstitutional, such a request is certainly implicit in their argument. In recent years, the Federal Government has restricted the State's freedom to impose limitations on the franchise and the right to hold public office, but in this case it is not the State of Arizona which seeks to restrict the right to hold office, but rather Petitioners who seek a narrower interpretation than that allowed by State law. The general right of States to prescribe qualifications for voting and impliedly office-holding are set out in *Lassiter v. Northampton County Board of Elections,* 360 U.S. 45 (1959) where the question at issue was a literacy test (literacy tests having since been abolished by Congress). In that case literacy tests were upheld and the Court said:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . ." 360 U.S. at 50.

In fact, in some respects, Arizona has been more liberal in permitting people to vote than the Federal Government. For example, the 1912 amendment of Article VII, Section 2 of the Arizona Constitution provided that women could exercise the franchise. This may be compared with the Nineteenth Amendment to the United States Constitution which granted the right of women to vote, but did not do so until 1920. There seems to be no challenge made to the right of a State to extend the franchise beyond that which may be the minimum required by Federal law. Similarly, it is important to note that prior to the enactment of the Twenty-sixth Amendment to the United States Constitution, lowering the voting age to 18, several States had already lowered the voting age below 21.

The question at issue in this action is the related right to hold office. In the recent case of *Bullock v. Carter,* 405 U.S. 134 (1972), the United States Supreme Court overturned the Texas primary election filing fee system and held, *inter alia*:

> "The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. [footnote omitted] However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical correlative effect on voters." 405 U.S. at 142-143.

Given the relationship between the right to vote and the right to become a candidate for and hold public office, and further given the fact that the State of Arizona has chosen not to make any distinction between those rights with respect to the Office of Supervisor, it must follow that Petition-

ers' argument is ill conceived since Respondent *does* meet all the State requirements for County Supervisor.

Petitioners nevertheless claim that Respondent cannot hold the Office of County Supervisor because (i) he is immune from service of civil process while on the Navajo Reservation and (ii) he does not own any real or personal property subject to taxation by the State of Arizona. Even assuming the correctness of these legal propositions as abstract matters, it hardly follows that one who is immune from service of civil process or one who does not own real or personal property subject to taxation should be prohibited from holding public office. As noted above, the requirements for the Office of County Supervisor are clearly set out in the statute. The courts cannot impose additional requirements In any event, when one examines the legal conclusions upon which this argument is premised, it is evident that these conclusions themselves are either erroneous or beside the point.

With respect to the claim that a person must own taxable property to hold public office, it should be noted that the Supreme Court of the United States has made it quite clear that one need not own property to vote in local bond elections. *Cipriano v. City of Houma,* 395 U.S. 701 (1969), *City of Phoenix, Arizona v. Kolodziejski,* 399 U.S. 204 (1970) and *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969). The test for holding public office should be no different. Moreover, to the extent that Respondent owns any property off the Reservation he pays taxes on that property just like any other person. He pays no real property taxes at the present time because he does not own any real property. The real property on which Respondent resides is owned by the United States Government in trust for the Navajo Tribe which, in turn, has granted a homesite

lease to Respondent. While Respondent is immune from income taxes from income earned *on* the Reservation under the recent ruling of the Supreme Court of the United States in *McClanahan v. State Tax Commission of Arizona,* .... U.S. ...., 93 S. Ct. 1257 (1973), he must pay State income taxes on any income earned *off* the Reservation. Indeed, Respondent himself pays income tax to the State of Arizona on his salary as County Supervisor. Moreover, Petitioners misstate the law with respect to Federal taxation of Indians for, like all other citizens, Indians pay Federal taxes. See *Comn'r of Int. Rev. v. Walker,* 326 F.2d 261 (9th Cir. 1964).*

Carried to its logical extreme, if Petitioners prevail any person who enjoys a tax exemption would be prohibited from running for public office. The fact of the matter is that the Federal and State tax laws do contain certain inequities, but merely because a person does not bear the full burden of the taxes imposed by law does not mean that he does not have an interest in the affairs of his government and should be prohibited from holding public office. Indeed several of Petitioners themselves enjoy certain tax advantages and writeoffs through their ownership of cattle which are not enjoyed by persons whose sole source of income is a salary. While this may constitute an inequity in the tax system, it hardly follows that a cattle owner should be prohibited from holding office. Respondent knows of no case which requires that an individual be subject to taxes or other laws himself in order to vote for such taxes or

*Petitioners' statement at page 8 that "the (non-Indian) minority of Apache County residents. . .pay all of the county taxes" is grossly in error. There is absolutely no evidence in the record (nor could there be any) to support this hyperbole, and, in fact, the public records of Apache County demonstrate that the County derives *more* in tax revenues from sources on the Navajo Reservation than it spends there.

laws either as a citizen in an election or as a public office holder. The nonsense of "taxation without representation" as expressed by Petitioners is essentially that they and their "constituents" for whom they presume to speak lack sufficient voting strength in order to have their will become law. Even assuming that non-Indians are in the minority in Apache County and that no non-Indian candidate would ever win an election contest (which has not heretofore been the case), surely no conceivable reading of constitutional law can require the minority be given the right to govern.

As to the claim that Respondent would not be subject to service of civil process for acts of wrongdoing committed while serving as a County Supervisor, it is clear that if Respondent is guilty of any malfeasance or misfeasance while in office, he can be recalled just like any other officer under A.R.S. § 19-201 *et seq.* without being served process. Moreover, even assuming that Respondent cannot be served with process on the Navajo Reservation for acts committed off the Reservation, under A.R.S. § 38-291(7) if he does not perform the duties of his office for three consecutive months his office shall be deemed vacant. See *McCluskey v. Hunter,* 33 Ariz. 513, 266 P. 18 (1928) where the Court stated:

> ". . . [I]f plaintiff ceased to discharge the duties of the office for three consecutive months without being sick or absent from the State by permission of the Legislature the office became vacant at the expiration of this period, *ipso facto,* as a result of his own act, and necessarily no hearing or order of removal was required . . ." 266 P. at 23.

Thus, if Respondent chooses not to come off the Reservation for fear of being served, he will be removed from office automatically.

The question the Court ought to ask is *not* whether Respondent is subject to service of civil process but whether

he can be removed, as any other officer, if he does not carry out his duties properly. The answer to that question is a resounding yes. Moreover, Petitioners are in error when they state that under Arizona law a Reservation Indian cannot be served with process for an act committed *off* the Reservation. No Arizona appellate court has ruled on that precise point and, within the past nine months, the Supreme Court of the State of New Mexico has ruled that a Navajo *is* subject to service of process for an act committed off the Reservation in the State of New Mexico. See *State Securities, Inc. v. Jimmie and Ruby Anderson,* ....N.M. ...., 506 P.2d 786 (1973).

Finally, as noted by Chief Justice Ross in his dissent in *Porter v. Hall, supra* (the Arizona case which held that Reservation Indians were *not* entitled to vote, a case which was subsequently overruled by *Harrison v. Laveen, supra*):

> "It may be that these plaintiffs and others in their situation, should not, as a matter of public policy, be granted the franchise, since they are not entirely emancipated from federal control, nor amenable while on the reservation to the state laws; but as the laws are now written it seems to me they are entitled to register and to vote." 271 P. at 419.

As Justice Ross would have done in 1928 and as the Supreme Court of Arizona did in *Harrison v. Laveen* in 1948 in vindicating the position taken by Chief Justice Ross, the proper function of this Court is that of applying the law as it stands, leaving to the Arizona Legislature the duty of changing the requirements for the Office of County Supervisor, if in its ultimate wisdom such a change is deemed appropriate.

II. There Is No Conflict of Decision.

As pointed out above, not only is *Elk v. Wilkins* not in conflict with the decision below, but rather the prediction in *Elk* that Indians could be made citizens was in fact borne out by an Act of Congress in 1924. Every court that has had occasion to rule on the matter has held that Reservation Indians are citizens. See p. 9, *supra*.

III. There Is No Important Question of Federal Law.

Certainly it is important that American Indians be accorded the full rights possessed by other citizens. Their special position within the American political process is a direct result of the history of this country in which they and not the white settlers were the original inhabitants. In return for the transfer of most of this country to the whites, the Indians have retained as a *quid pro quo* certain rights and privileges. This is small payment indeed for what has been given up. It is only in Petitioners' "Alice in Wonderland" view of this world that the American Indian, whose life span is shorter, whose level of education and income are substantially less and whose level of unemployment is eight times higher than that of his White brother, could ever be considered a "most favored citizen" (Petition, page 17).

There are, indeed, many propositions — including those we consider "self-evident" — that are "important". But that does not make them *issues* worthy of this Court's consideration. Thus, the right of the majority to govern is an important Federal question, but this Court has long laid to rest any doubt that the law stands behind the majority and a review in this case is not required or appropriate to consider Petitioners' dissenting view. *See: Baker v. Carr,*

369 U.S. 183 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Lucas v. The Forty-fourth General Assembly*, 377 U.S. 713 (1964).

The thrust of Petitioners' argument is that the majority has no right to govern. Their inclusion of the recently filed complaint seeking to reapportion Apache County (Appendix D) is designed to show how Indians plan to "take over" the County. What the complaint and the history of Apache County really show is that a minority has held sway for many years.* Nor is it even certain that that will change in the future. In the same election in the same area in which Respondent was elected, an Anglo candidate for the Arizona House of Representatives defeated a Navajo candidate. Thus, Petitioners' fear of domination by a majority is not only wrong in principle but it is also too remote and speculative to warrant consideration by this Court in any event.

In short, Petitioners are asking this Court to declare that they, as a minority in Apache County, have an individual right to govern even when they lose an election and that their asserted right presents an important Federal question. What they have presented, however, is not a "question" at all, let alone an "important Federal question". Rather, it is an absurd hypothesis rejected by this Court and every other court in the land and is unworthy of further consideration.

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*At page 8 of their Brief, Petitioners state that according to the 1970 Census of Population (Pl. Ex. 2), approximately 75% of the people in Apache County are "Reservation Indians". The 1970 Census data, however, shows only that 75% of the people in Apache County are "Indians"—not necessarily "Reservation Indians".

CONCLUSION

For the reasons stated above, Respondent prays that the Petition for a Writ of Certiorari should be denied.

December 27, 1973

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(Appendix Follows)

Appendix

State of Arizona
31st Legislature
1st Regular Session

SENATE

S.B. 1310
INTRODUCED
February 13, 1973

Introduced by Senators Corbet, Turley, Rottas, Baldwin

AN ACT

RELATING TO COUNTIES; PROVIDING FOR CREATION OF A NEW NAVAJO COUNTY; PROVIDING FOR A COUNTY COMMISSION TO ORGANIZE SUCH COUNTY; COMBINING GRAHAM AND GREENLEE COUNTIES INTO GRAHAM-GREENLEE COUNTY; AMENDING SECTIONS 11-103, 11-105 AND 11-107, ARIZONA REVISED STATUTES; REPEALING SECTIONS 11-108 AND 11-111, ARIZONA REVISED STATUTES; AMENDING TITLE 11, CHAPTER 1, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING A NEW SECTION 11-111, AND MAKING AN APPROPRIATION.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 11-103, Arizona Revised Statutes, is amended to read:

11-103. *Apache county*

Apache county, the county seat of which is St. Johns, is bounded as follows:

Commencing at a point where the boundary line between Arizona and New Mexico intersects the thirty-seventh par-

allel of north latitude, being the northeast corner of this state, thence south along the boundary line between Arizona and New Mexico to a point where the first standard parallel north intersects such boundary line, being the northeast corner of Greenlee county; thence due west of the Black river; thence westerly and down the Black river along the northern boundary of ~~Greenlee and Graham counties to the east line of range twenty three east of the Gila and Salt River Guide meridian; thence north along such range line to the southern boundary line of the Navajo reservation; thence west along such boundary line to the one hundred tenth meridian of west longitude; thence north along such meridian~~ GRAHAM-GREENLEE COUNTY TO ITS INTERSECTION WITH THE EAST BOUNDARY LINE OF GILA COUNTY, WHICH IS THE ONE HUNDRED TENTH DEGREE OF WEST LONGITUDE; THENCE NORTH TO ITS INTERSECTION WITH THE THIRTY-FOURTH DEGREE OF NORTH LATITUDE; THENCE WEST TO ITS INTERSECTION WITH THE WEST BOUNDARY LINE OF THE WHITE MOUNTAIN INDIAN RESERVATION; THENCE NORTH to the thirty-seventh parallel of north latitude; thence east along such parallel to the boundary line between Arizona and New Mexico, the point of beginning, EXCLUSIVE OF ALL LANDS NOW DESCRIBED AS NAVAJO COUNTY PURSUANT TO SECTION 11-111.

Sec. 2. Section 11-105, Arizona Revised Statutes, is amended to read:

11-105. *Coconino county*

Cococino county, the county seat of which is Flagstaff, is bounded as follows:

Commencing at the point where the thirty-seventh parallel of north latitude and the meridian of one hundred ten de-

grees forty-five minutes west longitude intersect; thence south along such meridian of one hundred ten degrees forty-five minutes west longitude to the rim rock of the Mogollon mountains; thence westerly along the rim rock of the Mogollon mountains, and the northern boundary of Gila county to the east line of range seven east, Gila and Salt River Guide meridian; thence north on such east line of range seven to the fourth standard parallel; thence west on the fourth standard parallel to the east line of range five east; thence north on the east line of range five east to the north line of township eighteen north; thence west on the north line of township eighteen north to the Gila and Salt River Guide meridian; thence north on such meridian to the fifth standard parallel; thence west on such parallel to the east line of range two west; thence north on the east line of range two west to a point one mile north of the center of the right of way of the Atchison, Topeka & Santa Fe railroad; thence westerly in a line one mile north of and parallel with the center of such right of way to the meridian one hundred thirteen degrees twenty minutes west longitude; thence north along the meridian line one hundred thirteen degrees twenty minutes west longitude to the point where the meridian line one hundred thirteen degrees twenty minutes intersects the Colorado river; thence up the Colorado river to the mouth of the Kanab wash; thence to Kanab wash and creek to a point where such wash and creek intersects the thirty-seventh parallel of north latitude; thence east along the thirty-seventh parallel of north latitude to the meridian of one hundred ten degrees forty-five minutes west longitude, the place of beginning, EXCLUSIVE OF ALL LANDS NOW DESCRIBED AS NAVAJO COUNTY PURSUANT TO SECTION 11-111.

Sec. 3. Section 11-107, Arizona Revised Statutes, is amended to read:

11-107. *Graham-Greenlee county*

~~Graham~~ GRAHAM-GREENLEE county, the county seat of which is Safford, is bounded as follows:

Commencing at a point on the east line of range eighteen east, six miles south of where the line of the second standard parallel south intersects the eastern line of range eighteen east, being the northwest corner of Cochise county; thence due north on the east line of range eighteen, being the eastern boundary of Pinal and Gila counties, to a point where the east line of range eighteen east intersects the Gila river; thence along the Gila river to the mouth of the San Carlos river; thence up the San Carlos river to a point where the San Carlos river intersects the north line of township one north; thence east along the north line of township one north and along the southern boundary of Gila county to the one hundred tenth meridian of west longitude; thence north along the one hundred tenth meridian west longitude to the Black river; thence up the Black river ~~to the intersection of the Black river with the east boundary of the White Mountain of San Carlos Indian reservation, which is the one hundred nine degree thirty minute meridian of longitude west; thence due south along the east boundary line of the White Mountain of San Carlos Indian reservation, to the southeast corner of the reservation, as established under instructions from the United States surveyor general of Arizona in the year 1883; thence in a south southeasterly direction in a direct line to the highest point of Thumb Butte; thence in a southerly direction along the watershed to the summit of the north end of the Pedoncillo range of mountains; thence in a general southeasterly direction along the summit of such range to~~

~~its intersection with the north boundary line of Cochise county; the point of intersection being the township line between townships eleven and twelve south, Gila and Salt River Guide meridian;~~ IN A GENERAL NORTHEASTERLY DIRECTION TO THE INTERSECTION OF THE CENTER OF THE BLACK RIVER WITH THE FIRST STANDARD PARALLEL NORTH, GILA AND SALT RIVER GUIDE MERIDIAN; THENCE DUE EAST ALONG SUCH FIRST STANDARD PARALLEL TO ITS INTERSECTION WITH THE EAST BOUNDARY OF ARIZONA; THENCE SOUTH ALONG THE EAST BOUNDARY OF ARIZONA TO ITS INTERSECTION WITH THE NORTH BOUNDARY OF COCHISE COUNTY; thence west along the northern boundary line of Cochise county to a point six miles south of where the eastern line of range eighteen east intersects the second standard parallel south, being the place of beginning.

Sec. 4. *Repeals*

Sections 11-108 and 11-111, Arizona Revised Statutes, are repealed.

Sec. 5. Title 11, chapter 1, article 1, Arizona Revised Statutes, is amended by adding a new section 11-111, to read:

11-111. *Navajo county*

NAVAJO COUNTY, THE COUNTY SEAT OF WHICH IS WINDOW ROCK IS BOUNDED BY THE EXTERIOR BOUNDARIES OF THE NAVAJO INDIAN RESERVATION WITHIN THIS STATE, INCLUDING THE HOPI INDIAN RESERVATION AND OTHER LANDS LOCATED WITHIN SUCH EXTERIOR BOUNDARIES.

Sec. 6. *County commission; members; appointment; term; duties; initial board of supervisors*

A. There shall be a county commission of Navajo county, composed of five bipartisan members appointed by the

governor. Commission members shall be residents of Navajo county and shall be appointed to a term expiring on January 1 next following the general election held in 1974.

B. The county commission shall be responsible for the organization of Navajo county.

C. The initial county board of supervisors of Navajo county shall be elected at the general election held in 1974 to serve a term beginning January 1, 1975, and expiring two years thereafter. Thereafter, all county boards of supervisors of Navajo county shall be elected for a term of four years.

Sec. 7. *Appropriation; purpose; exemption*

A. The sum of twenty thousand dollars is appropriated to the county commission of Navajo county to carry out the provisions of this act.

B. The appropriation made pursuant to this section is exempt from the provisions of section 35-190, relating to lapsing of appropriations.

Sec. 8. *Effective date*

The provisions of this act shall become effective on January 1, 1974, except that the provisions of section 3 of this act shall become effective on January 1, 1977.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-860

THOMAS MINYARD, TED SPURLOCK, CLAIR PLATT, JAY REESE; APACHE COUNTY BOARD OF SUPERVISORS and JAMES A. McDONALD, LARRY STRADLING and ARTHUR LEE, constituting the members thereof and MARGARET LEE, in her official capacity as Clerk of the Apache County Board of Supervisors,

Petitioners,

vs.

TOM SHIRLEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

PETITIONERS' REPLY TO OPPOSITION BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES CITED

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Miller Bros. Co. v. Maryland, 347 U.S. 340, 74 S. Ct. 535, 98 L. Ed. 744, 748 (1954) 5

Porter v. Hall, 34 Ariz. 308, 271 P. 411 (1928) 9

Slagel v. Ohio, 336 U.S. 259 (1961) 2

State Securities, Inc. v. Anderson, ... N.M. ....., 506 P.2d 786 (1973) 2

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PETITIONERS' REPLY TO OPPOSITION BRIEF OF RESPONDENT

CAPTION

Respondent in a footnote on page one of his brief contends Petitioners caption is incorrect. This is untrue. James A. McDonald was the member of the Board of Supervisors when this case was filed and continued to be through the appeal to the Arizona Supreme Court. If this Court reverses the Arizona Court he will again be the Supervisor. He is and has been an interested party and thus can and must remain on the caption. In addition,

it is not only anomalous, as Respondent's counsel suggests, for Tom Shirley to be suing himself but it is legally impossible.

JURISDICTION

Counsel for Petitioners accidentally miscited in the Petition for Certiorari that jurisdiction of this Court was conferred by 28 U.S.C. § 1254(1). Counsel intended to refer to 28 U.S.C. § 1257(3) which applies to certiorari from state courts. Petitioners respectfully request that the Court review the case pursuant to 28 U.S.C. § 1257(3) which does give this Court jurisdiction as acknowledged in Respondent's brief. There appears to be no reason why the Court cannot so treat the petition, since the Court frequently considers a case filed as an appeal as one for certiorari where improperly filed as an appeal. *Slagle v. Ohio,* 366 U.S. 259 (1961).

The statement by counsel for Respondent that "Petitioners have not presented issues in a manner sufficient to give this Court jurisdiction under any statute" is unintelligible. No further explanation for the statement is given. Indeed, the very next sentence of the brief acknowledges that the first question raised by Petitioners concerning the unconstitutionality of 8 U.S.C. § 1401 (a)(2) gives this Court jurisdiction. The "Questions Presented" in the petition clearly conform to the Supreme Court rules and under 28 U.S.C. § 1257(3) give this Court jurisdiction.

REPLY ARGUMENT

I. *Much of Respondent's Brief is Immaterial and Lacks Foundation.*

Respondent's brief is an attempt to "snow" this Court. The time and contents of the Board meeting described in the last paragraph of page 3 of Respondent's brief has nothing to do with the merits of this case.

The statement in the first full paragraph of page 8 is nothing but emotional rhetoric with absolutely no foundation in fact in this or any other law suit.

Tax writeoffs discussed on page 13 of the brief are immaterial and not supported by the record.

Finally Respondent's statement at page 17 concerning the election of an Anglo to the Arizona House of Representatives is totally irrelevant since that legislative district does not, in the least conform to the boundaries of Apache County. The district takes in much territory outside of Apache County and only covers a portion of Apache County.

II. *Significant Issues of Federal and Constitutional Law Are Raised by the Petition.*

Counsel for Respondent contends that Petitioners have not presented "a 'question' at all, let alone an 'important Federal question'." Yet the contention is directly contradicted by counsel for Respondent at page 5 of his opposition brief where he states:

> "Because of the Federal constitutional issues which appeared on the face of the complaint, Respondent removed the pending action to Federal Court . . ."

Indeed, five very substantial Federal and Constitutional issues are raised by this case. The concept of government controlled by those who are not subject to the government is totally foreign to the institution of democracy. Respondent's brief attempts to resolve for this Court the merits of the case. The duty of the Petition for Certiorari, the Response and Reply is to demonstrate that a full briefing and oral argument should be entertained by this Court in a case of such far reaching consequences. This Court has never before been called upon to consider the effect upon the rights of the non-Reservation population of the granting of a special and unique legal status to Reservation Indians based solely upon race. Petitioners do not, as Respondent suggests, contend that the Reservation Indian cannot hold office because he is an Indian. Rather, it is the special, unique, preferential legal status afforded against the minority of non-Indians in Apache County.

Undoubtedly, if the non-Negro majority of New York City or any other governmental subdivision were permitted to levy taxes upon Negros from which taxes the non-Negro majority was immune and were permitted to impose law and court jurisdiction upon the Negros while the non-Negro majority were not subject to those same laws and courts, this Court would find there existed substantial federal and constitutional issues to which the Court should turn its undivided attention. There is no reason why any less consideration should be given to the identical issues posed in this case.

As acknowledged by Respondent at page 10 of his brief, it is implicit in Petitioners argument that A.R.S. § 11-211(a), governing the qualification of Supervisors, is unconstitutional. Lest there be any doubt, it is the very definite contention of Petitioners that A.R.S. § 11-211 is unconstitutional as applied to Reservation Indians because to allow them to hold office when they are not citizens or residents and when they are not subject to taxes and laws they would impose would violate the Citizenship, Due Process and Equal Protection clauses of the 14th Amendment and the Civil Rights Act.

Whether or not Arizona can be more liberal in permitting voting than the Federal government requires is beside the point. The issue is whether or not Arizona statutes governing the qualifications for office take precedent over the U.S. constitution and the Civil Rights Act. Meeting all of the statutory requirements to hold office is of no avail if to hold that office pursuant to those statutes is unconstitutional and violative of the Civil Rights Act. Thus, A.R.S. § 11-211 is unconstitutional *as applied to Reservation Indians* in view of their legal status. It is unconstitutional because of the answers to the issues presented in Petitioners' initial Petition and this Reply.

III. *The Citizenship of Reservation Indians Poses A Substantial Constitutional Question.*

While counsel for Respondent disagrees with Petitioners inter-

pretation and application of *Elk v. Wilkins,* 112 U.S. 94 (1884), it cannot be said that its application to the Respondent in this case does not constitute an important constitutional question to be resolved by this Court upon a full briefing. Some courts, subsequent to the decision in *Elk,* may have interpreted the *Elk* decision to permit Congress to make Reservation Indians citizens without also making them subject to taxation and state jurisdiction; if so, those decision are simply wrong. Since the Supreme Court in *Elk* expressly premised its ruling concerning Reservation Indian citizenship upon the taxation and jurisdictional clauses of the 14th Amendment, any attempt by Congress to make Reservation Indians citizens *without also making them subject to taxation and state and federal court jurisdiction* would violate the 14th Amendment as interpreted by the Court in *Elk.* Undoubtedly, Congress has the power to confer citizenship, but only by legislation which is consistent with the Constitution. An individual is not a United States citizen, no matter how many times either the Respondent or Congress say he is, unless he fulfills the criteria mandated by the 14th Amendment.

Miller Bros. Co. v. Maryland, 347 U.S. 340, 74 S. Ct. 535, 98 L. Ed. 744, 748 (1954) recently confirmed that subjection to taxation is essential to citizenship when the Court stated:

> "Since the Fourteenth Amendment makes one a citizen of the state wherein he resides, the fact of residence creates universally recognized reciprocal duties of protection by the state *and of allegiance and support by the citizen. The latter obviously includes a duty to pay taxes,* and their nature and measure is largely a political matter." (Emphasis supplied.)

Similarly, subsequent to *Elk v. Wilkins,* the Supreme Court in *In Re Heff,* 197 U.S. 488, 25 S. Ct. 506 49 L. Ed. 848 (1905) reiterated that an Indian must be subject to the jurisdiction of the state in order to be a United States citizen. The Court cited approvingly the Solicitor General who stated:

> "It would seem that Congress intended citizenship of the United States to attach at the same time that the Indian

> became subject to the laws of the state or territory in which he resides. As a matter of constitutional law, an Indian appears to be entitled to benefit of, and to be subject to, the laws of the state in which he resides the moment he becomes a citizen of the United States." (49 L.Ed. at 855.)

Further, the *Heff* court stated:

> "An Indian upon whom has been conferred citizenship, and who enjoys the protection of the laws of the state, should be punished for a transgression of them." (49 L.Ed. at 856.)

Thus, serious question remains as to whether an Indian may be a citizen while immune from state law and jurisdiction. On the other hand, none of the cases cited by the Respondent analyzed the language of the 14th Amendment as it relates to Indian Citizenship as did the Court in *Elk*. Consequently, they bear little weight on the issue at hand.

As to residency, certainly the question of whether the inhabitants of a dependent nation are residents of a state and county is a substantial federal question since this dilemma was created by United States Treaty. In addition, if they are declared residents of Arizona and Apache County it gives rise to the other constitutional issues raised in the Petition for Certiorari as to whether he may hold the office of Supervisor.

IV. *Civil Right of Petitioners Have Been Violated.*

The Respondent has entirely failed to respond to Petitioners fifth question presented which alleges violations of Petitioners' Civil Rights under 42 U.S.C. § 1981. It is generally held that failure to respond to issues raised in a brief is an admission concerning that issue. *Bolova Watch Co. v. Super Dept. Stores of Arizona,* 4 Ariz. App. 553, 422 P.2d 184 (1967); 5 C.J.S. *Appeal and Error* § 1344 at 391, n.29. Thus, it is conceded by Respondent that the question regarding the violation of the Petitioners' Civil Right is a substantial Federal question warranting review by this Court.

Indeed, this is the heart of the error of the Arizona Supreme Court decision below. Recognition of this issue dispells Respond-

ents arguments that the issues raised by Petitioners are resolved by those cases which hold that one need not own property to vote in local bond elections. It is not now, nor was it ever the contention of Petitioners that the Respondent must own property to hold office. Rather, Petitioners contend that the Respondent must be subject to those same laws and taxes he seeks to impose upon Petitioners if he is to hold a public office which grants him power to impose such taxes and laws upon Petitioners.

Respondent admits that he is not subject to many of the same taxes, pains, penalties and responsibilities as are the Petitioners. Thus, § 1981 of the Civil Rights Act clearly takes effect when the Respondent seeks to impose those taxes, pains, penalties and responsibilities upon the Petitioner and when he seeks to hold the same office as Petitioners without being subject to the same pains, penalties and taxes.

V. *The Taxation Issue Does Present Constitutional Questions.*

While it is true that in some instances the Reservation Indian may pay small amounts of taxes, many aliens are subject to greater taxes than Reservation Indians. This, however, does not confer upon aliens citizenship or the right to vote and hold office.

The fact is Apache County is not financed by state income taxes which an Indian, working off the Reservation, may occasionally pay; it is not financed by Federal Income Tax which Indians may or may not pay (the question has not yet been resolved by this Court). Rather, it is financed by property taxes assessed upon real and personal property of the minority of Apache County non-Indian residents. Further, it is only the property taxes which the Respondent has the power to assess as a County Supervisor. A casual examination of the map of Apache County reveals that more than 50% of the county is Reservation lands which provide no taxable land base for the county.*

*Taxes which come from the Reservation are from non-Indians living on the Reservation or from Public or Private Utilities located on the Reservation.

While non-Indians who live on the Reservation must pay personal property taxes to the county, Indians living on the Reservation do not. Therein lies the gross inequities. Certainly such a complex and potentially devastating problem deserves the studied review of this Court after full briefing. The alternative may be a sequel to the Boston Tea Party.

VI. *The Lack of Jurisdiction Over Indian Office Holders Presents Constitutional Questions.*

Respondent contends that Civil and criminal recourse over the Respondent need not exist because he can be recalled. The suggestion is factual and legal nonsense. First, it is logical that malfeasance or nonfeasance by county officers involving county taxes or property is not a concern to the 75% Reservation Indian population who pay no taxes to the county. Consequently, the possibility is nonexistent that the necessary signatures on a recall petition, much less votes at an election could be obtained to oust an Indian Supervisor elected from a district located entirely upon the Reservation where the population is probably only 3 or 4 per cent non-Indian.**

Second, even if recall were a practical alternative, it does not mean that the Respondent need not be amenable to the other civil and criminal remedies, which would apply to the Petitioner Supervisors. This would obviously violate the express language of the Civil Rights Act. Further, it would deprive the taxpayers and county of remedies to compensate the taxpayers and the county for the Respondent's nonfeasance or malfeasance in office. This is tantamount to locking the gate after the horse has already escaped. The same rational applies to Respondent's suggestion that he can be removed without legal action for three months of non-performance in office (which is an incorrect legal state-

**After the redistricting sought in the complaint, attached as Appendix D of the petition, is accomplished, two of the three supervisorial districts will be entirely on the Reservation.

ment in any event as Petitioners will demonstrate upon a full briefing if the Court hears this case).

The case of *State Securities, Inc. v. Anderson,* ..... N.M. ....., 506 P.2d 786 (1973) cited by Respondent regarding service of process on a Reservation Indian while he is on the Reservation for acts committed off the Reservation was decided by a divided court (3 to 2). Further, it is in direct conflict with the Colorado and Minnesota Supreme Court decisions in *Martin v. Denver Juvenile Court,* 493 P.2d. 1093 (Colo. 1972) and *Commissioner of Taxation v. Brun,* 174 N.W. 2d 120 (Minn. 1970). This conflict on this important principle of Indian law is further reason why this Court should hear this case.

The question of lack of jurisdiction over Reservation Indian office holders boils down to this: Can the Respondent Supervisor because he is Indian, hold the identical office as the Petitioners and yet not be subject to *all* the sanctions, controls, or punishments imposed by law upon the Petitioner Supervisors? Further, may the taxpayers have less legal recourse against one supervisor because of his race than they do against others of a different race? Under todays concepts of Equal Protection and Civil Rights, the answer must be an obvious and resounding NO! Yet Respondent contends that there is no reason for this Court to hear this case. Rather, he has the audacity to suggest that the Petitioners remedy is to divide the county by Senate Bill 1310 (attached as an Appendix to Respondent's Brief) which bill the Navajo Tribe opposed.

VII. *Conclusion.*

Justice Lorna Lockwood, the author of the Arizona Supreme Court opinion below, erred when she ignored the wisdom of her father who wrote the opinion in Porter v. Hall, 34 Ariz. 308, 271 P. 411 (1928) which held that the Reservation Indian, being under guardianship, could not vote. In that case Justice Lockwood stated:

"It is almost unheard of in a democracy that those who make the laws need not obey them." (34 Ariz. at 322.)

The Court below has, in this case, just held that those who make the law need not be subject to them. If this is the proposed new concept of democracy, then we certainly think that it should be thoroughly reviewed by this nation's highest Court—the ultimate protector of democracy.

For this reason the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this ..... day of January, 1974.

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